2009 MAY 21 A 9:01

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
LAS VEGAS DIVISION

UNITED STATES OF AMERICA :

v. : **No. CR 97-199-TJM**
(Northern District of New York)

LARRY MILLER, :

Defendant-Movant. :

Prisoner Number & Place of Confinement: serving three-year term of supervised release under the jurisdiction of the district of Nevada; currently supervised in the district of Nevada; Fed. Reg. No. 21987-048.

MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. 2241

1. **(a) Name and location of court which entered the judgment of conviction under attack.** United States District Court, Northern District of New York. Jurisdiction was transferred to the district of Nevada in January, 2009.

(b) Criminal docket or case number (if you know): CR 97-199-TJM

2. **(a) Date of judgment of conviction (if you know): December 21, 1999**

(b) Date of sentencing: December 20, 1999

3. Length of Sentence. 210 months, three years of supervised release, $79 million forfeiture, $20,000 fine and $100 special assessment.

Reduced to time served, three years supervised release, $79 million forfeiture, $20,000 fine and $100 special assessment on or about November 3, 2008, pursuant to government motion for reduction of sentence under Fed. R. Crim. P. 35(b)(2).

4. Nature of offense involved (all counts) Conspiracy to commit money laundering, 18 U.S.C. § 1956(h).

5. **(a) What was your plea? (Check one) guilty**

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? Pleaded guilty to count 3 pursuant to plea agreement.

6. If you went to trial, what kind of trial did you have? (Check one). N/a

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? n/a.

8. Did you appeal from the judgment of conviction? Yes

9. If you did appeal, answer the following:

(a) Name of court: United States Court of Appeals for the Second Circuit.

(b) Docket or case number (if you know):

(c) Result: Affirmed

(d) Date of result: March 23, 2001

(e) Citation to the case (if you know): 248 F.3d 1180; 7 Fed. Appx. 59 (table)

(f) Grounds raised:

1. Guilty plea was not knowing and voluntary, because the court failed to thoroughly explain the nature of the charges to which he pleaded guilty;
2. Government breached plea agreement;
3. Court erred in applying money laundering guidelines;
4. Improper interference with Sixth Amendment right to counsel of choice;

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes.

If "Yes," answer the following:
(1) Docket or case number (if you know):
(2) Result: cert. denied
(3) Date of result (if you know): 10/1/2001
(4) Citation to the case (if you know): 534 U.S. 874 (2001)
(5) Grounds raised:

Whether a prosecuting authority which has promised in a plea agreement to file a motion for a downward departure under §5K1.1 can be compelled to do so where the prosecuting authority has conceded that the defendant has provided substantial assistance, but has refused to file a §5K1.1 departure motion based upon factors other than the degree of substantial assistance rendered by the defender.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or other motions with respect to this judgment in any court? Yes.

(a) (1) Name of court. U.S. District Court, Northern District of New York

(2) Docket or case number (if you know): CV 02-1234-TJM

(3) Date of filing (if you know): September 27, 2002

(4) Nature of proceeding. 28 U.S.C. § 2255

(5) Grounds raised:

1. Ineffective assistance of trial and appellate counsel for failing to raise the claim that the district court erred in applying an unduly low burden of proof in deciding whether the government breached the plea agreement by refusing to move for a downward departure.

2. The plea agreement was invalid, because it contained an unenforceable, unconscionable term.

3. The government breached the plea agreement, because it failed to advise the district court of the full nature of Mr. Miller's cooperation at sentencing.

4. Mr. Miller is actually innocent of money laundering and his guilty plea was unknowing and involuntary.

5. Ineffective assistance of counsel in connection with advice to enter into a plea agreement that provided for a total forfeiture of $79 million.

6. Ineffective assistance of counsel at sentencing.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? No

(7) Result. Denied

(8) Date of result (if you know). August 18, 2003

(b) If you filed any second motion, petition, or application, give the same information:: N/A

(1) Name of court.

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of proceeding.

(5) Grounds raised.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

(7) Result.

(8) Date of result (if you know).

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes, but Second Circuit denied certificate of appealability

(2) Second petition: N/A

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: N/A

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Defendant is actually innocent of conspiracy to commit promotional money laundering, and his conviction should be vacated.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Pursuant to a criminal indictment, defendant pleaded guilty to conspiracy to engage in money laundering under 18 U.S.C. § 1956(h). The district court sentenced him to 210 months' imprisonment, a $79 million forfeiture and three years' supervised release. The money laundering arose out of Mr. Miller's involvement in smuggling cigarettes and alcohol.

A conviction for money laundering requires that the government prove the defendant participated in a financial transaction with the proceeds of some specified unlawful activity.

The Supreme Court has now made clear that a conviction for money laundering requires that the government prove the defendant participated in a financial transaction with the proceeds of some specified unlawful activity. 18 U.S.C. § 1956(a)(1). The Supreme Court conclusively interpreted the term "proceeds" as meaning the net profits from an underlying criminal activity. *Santos v. United States*, 128 S. Ct. 2020 (2008); *accord United States v. Scialabba*, 282 F.3d 475, 477-78 (7th Cir. 2002)(addressing promotional money laundering), *cert. denied*, 154 L.Ed.2d 565 (2002). The *Santos* decision made clear that a knowing and intelligent guilty plea to money

(2002). The *Santos* decision made clear that a knowing and intelligent guilty plea to money laundering requires the defendant to admit to having used the net profits of the underlying criminal activity in furtherance. Merely reusing the gross receipts over and over to pay the expenses of the underlying criminal activity does not constitute money laundering.

Both the district court and Mr. Miller's attorney misinformed him as to the nature of the crime of money laundering. Consequently, neither Mr. Miller, the court, nor counsel understood an essential element of the money laundering charge. In particular, Mr. Miller did not understand that money laundering required him to use the "proceeds" of a specified unlawful activity to promote the specified unlawful activity, as that term is correctly defined. Thus, although Mr. Miller pleaded guilty to money laundering, he was not made aware that to be guilty of the crime charged, he had to have used the proceeds, i.e., profits of a specified unlawful activity, to further the underlying unlawful scheme. Mr. Miller is actually innocent of conspiracy to commit money laundering. He did not admit to, and there is no factual basis for, a conclusion that he conducted financial transactions which involved the proceeds, i.e., profits, of a specified unlawful activity. Thus, Mr. Miller is both actually innocent and his guilty plea was not knowingly and intelligently entered guilty, because he did not understand what was really required for a money laundering conviction, and did not admit to a necessary element as defined in *Santos*.. *Bousley v. United States*, 523 U.S. 614 (1998). Rather, Mr. Miller reasonably understood "proceeds" to mean the reinvestment of initial capital and gross receipts as opposed to reinvestment of net profit.

Mr. Miller filed a motion under 28 U.S.C. § 2255, raising this very claim. However, the district court rejected Mr. Miller's argument, concluding that a conviction for money laundering based on a promotional theory did not require the government to prove that the defendant used the profits from a specified underlying criminal activity. Instead, the district court wrongly concluded that "proceeds" meant receipts. Decision Denying § 2255 Motion at 5-7. The district court also rejected the related claim of ineffective assistance of counsel, concluding that "counsel's performance was not obviously deficient," because the term "proceeds," is not coextensive with either net or gross profits. *Id.* at 5-6.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

No.

(2) If you did not raise this issue in your direct appeal, explain why: Claim was not available, and counsel was constitutionally ineffective.

GROUND TWO:

Defendant's guilty plea to conspiracy to commit money laundering was not knowing and intelligent, because he was misinformed as to the elements of the offense, namely the proper definition of proceeds. Defendant incorporates by reference the facts and law set forth with regard to Ground One.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

No.

(2) If you did not raise this issue in your direct appeal, explain why: Claim was not available, and counsel was constitutionally ineffective.

GROUND THREE: Defendant received ineffective assistance of counsel in connection with the negotiation of the plea agreement, because counsel did not attempt to limit criminal forfeiture to net profits. He was prejudiced, because he agreed to a criminal forfeiture when he was actually innocent of money laundering. He also was prejudiced, because his inability to satisfy the forfeiture resulted in the imposition of a harsher sentence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Mr. Miller's former attorney Richard Ferris recommended that Mr. Miller enter into a plea agreement under which he conceded that the total amount forfeitable was $79 million under the theory that this was the sum "involved in" the offense. This recommendation was based on an inadequate and unreasonable pretrial investigation of the facts and law and was therefore deficient. The unreasonable pretrial investigation included counsel's failure to have the records evaluated by a financial professional such as an accountant, who would have been qualified to assess the amount of proceeds.

The $79 million significantly overstated the amount of money actually forfeitable, because 18 U.S.C. § 982(a)(2) incorporates by reference the statutory definition of 18 U.S.C. § 1956. Under § 1956, the amount of money laundered are limited to the proceeds, i.e., the profits of the underlying criminal activity. Thus, under 18 U.S.C. § 982, the amount that may be forfeited is the proceeds of the underlying criminal activity. Counsel failed to recognize this distinction.

Counsel's error prejudiced Mr. Miller. He agreed to forfeit an amount greater than the profits he earned and far more than he ever had available to satisfy the government.

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

No.

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel could not be raised on direct appeal, because of need to develop the record. In any event, ineffective assistance of counsel claim need not be raised on direct appeal.

(c) Post-Conviction Proceedings as to Grounds 1-3

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes as to all.

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: 28 U.S.C. § 2255

Name and location of the court where the motion or petition was filed: U.S. District Court for the Northern District of New York (previously mentioned), 100 S. Clinton St., Syracuse, N.Y. 13261

Docket or case number (if you know): CV 02-1234-TJM

Date of the court's decision: August 18, 2003

Result (attach a copy of the court's opinion or order, if available): Attached

(3) Did you receive a hearing on your motion, petition, or application?

No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: U.S. Court of Appeals for the Second Circuit

Docket or case number (if you know): 03-2759

Date of the court's decision: May 5, 2004

Result (attach a copy of the court's opinion or order, if available): Attached

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: n/a

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: No.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging::

(a) At preliminary hearing: n/a

(b) At plea: Richard Ferris, 405 Mayro Building, Utica, N.Y. 13501 (315) 724-3749.

(c) At trial: n/a

(d) At sentencing: same

(e) On appeal: Bruce Bryan, 333 East Onodaga Street, Syracuse, N.Y. 13202.

(f) In any post-conviction proceeding: Karen L. Landau, 2626 Harrison St., Oakland, CA 94612 (510) 839-9230 x 14; David Smith, English & Smith, 526 King Street, Suite 213, Alexandria, VA 22314 (703) 548-8911.

(g) On appeal from any ruling against you in a post-conviction proceeding: Karen L. Landau and David Smith

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? N/A

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.

The motion was filed within one year of the date on which the Supreme Court decided *Santos v. United States,* 128 S. Ct. 2020 (2008), and recognized that in a money laundering prosecution, the term proceeds must be defined as net profits, not as gross receipts. Movant previously raised this claim, but the district court and Second Circuit rejected it. It is now clear that the district court and Second Circuit's decision were wrong.

WHEREFORE, for the foregoing reasons, the defendant prays that this Court:

a. Direct that an Answer be filed; and then, after hearing,

b. Vacate the defendant's conviction and sentence.

Dated: 5-21-09

Respectfully submitted,
Larry Miller

By: [signature]
LARRY MILLER

VERIFICATION

Pursuant to 28 U.S.C. § 1746, Larry Miller declares, under penalty of perjury, that:

1. I have read the foregoing Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241, in which I am the defendant-movant.

2. I know that the factual allegations contained in the motion are true.

3. With respect to facts alleged in the motion upon information and belief, I believe these factual allegations to be true.

4. I declare under penalty of perjury that this Verification is true and correct.

LARRY MILLER

Dated: 5-21-09
At Las Vegas, Nevada

CERTIFICATE OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over the age of 18 years.

On May __, 2009, I served a copy of the attached

> Petition for Writ of Habeas Corpus (28 U.S.C. § 2241)

upon the interested parties herein, by causing a true and correct copy of said documents to be enclosed in a sealed envelope and deposited in the United States mail or by third party commercial carrier for delivery within three calendar days, at Las Vegas, Nevada, addressed as follows:

Office of the United States Attorney
333 Las Vegas Blvd., South
Las Vegas, NV 89101

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 21, 2009.

[signature]
Larry Miller

Served 8/18/03 amt

(27)

amt

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT - N.D. OF N.Y.
FILED
AUG 18 2003
AT____ O'CLOCK______
Lawrence K. Baerman, Clerk - Binghamton

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v. 5:02-CV-1234

LARRY MILLER,

Defendant-Movant.

THOMAS J. McAVOY
United States District Judge

DECISION and ORDER

I. INTRODUCTION

Larry Miller moves pursuant to 28 U.S.C. § 2255 to vacate or set aside his conviction and sentence on the grounds that: (1) he received the ineffective assistance of counsel because his attorneys failed to raise an issue in the district court and on appeal concerning the evidentiary standard in determining whether he breached the plea agreement; (2) the plea agreement is unconscionable because it gives the government the sole authority and discretion to determine whether the plea agreement was breached; (3) the government breached the plea agreement by failing to advise the court of the nature and extent of his cooperation at or before sentencing; (4) he is actually innocent and/or he did not make a knowing and voluntary decision to enter into a plea agreement based on the definition of "proceeds" adopted by the Seventh Circuit Court of Appeals in United States v. Scialabba, 282 F.3d 475 (7th Cir.), cert. denied, 123 S. Ct. 671 (2002); (5) he received the ineffective assistance of counsel because his attorney recommended that he enter into a plea stipulating that $79 million was the amount of money that should be forfeited to the government; (6) he received the ineffective assistance of counsel because his attorney recommended that he enter into a plea stipulating that $79 million was the value of the funds laundered; and (7) he received the ineffective assistance of counsel because his attorney failed to request a downward departure for substantial assistance under U.S.S.G. § 5K2.0.

II. FACTS

The basic facts surrounding the conspiracy are set forth in the Second Circuit's opinion. United States v. Miller, 7 Fex. Appx. 59, 2001 WL 300536 (2d Cir.), cert. denied, 534 U.S. 874 (2001). Miller pleaded guilty to one count of participating in a money laundering conspiracy in violation of 18 U.S.C. § 1956(h). Miller was sentenced to 210 months imprisonment. His conviction was affirmed on appeal. Id.

III. DISCUSSION

a. Standard to be Applied in Reviewing a Breach of the Plea Agreement/Conscionability of the Plea Agreement

Miller first contends that his counsel was ineffective because he failed to raise the proper standard of proof required to demonstrate a breach of the plea agreement. According to Miller, this Court erroneously required the government to prove that it had a good faith belief that Miller breached the plea agreement (as opposed to requiring proof of a breach by a preponderance of the evidence) to relieve it of its obligation to move for a substantial assistance departure.

This argument must be rejected for several reasons. First, because the plea agreement did not obligate the government to move for a departure based on substantial assistance, it was not objectively unreasonable for Miller's counsel not to raise this issue.[1]

Second, even assuming *arguendo*, that counsel's conduct was deficient, the government was not seeking to nullify the plea agreement on the grounds that Miller violated the terms thereof, but, rather, merely used his non-fulfillment as one of its reasons for exercising its discretion not to move for a downward departure.

Third, a similar argument was addressed and rejected by the Second Circuit on appeal. See Miller, 2001 WL 300536 at *2.

Fourth, under the facts and circumstances of this case, this argument is unsupportable. See United States v. Saladino, 62 Fed. Appx. 386, 2003 WL 1798984 (2d Cir. 2003) (rejecting a similar argument); United States v. Brown, 321 F.3d 347, 354 (2d Cir. 2003); United States v. Rexach, 896 F.2d 710, 713 (2d Cir. 1990). The plain terms of the plea agreement provide that "[t]he United States may, but shall not be required to, make a motion [for substantial assistance]. . . . The decision to make a motion for a departure [for substantial assistance] . . . shall rest in the sole discretion of the United States Attorney. . . . The United States has made no promise, express, implied, or otherwise, that it will move for a departure based upon LARRY MILLER's 'substantial assistance.'" This provision is clear and unambiguous. The government's only obligation under the contract was to "advise the Court of any assistance provided by Larry Miller." The government did not contract to file a motion pursuant to U.S.S.G. § 5K1.1 and, thus, Miller has no basis upon which to complain about the government's failure to seek a downward departure for substantial assistance.[2] See Rexach, 896 F.2d at 713 ("[I]n the absence of a specific agreement, the decision by the prosecutor to forego a downward departure motion in a particular case is not subject to judicial review at all.").

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[1] The government's obligation under the plea agreement is discussed more fully *infra*.

Even if the government did agree to make a departure motion, the contract is not unconscionable because the government's discretion is tempered by the bad-faith standard. See id.[3] The Second Circuit has already held that there was evidence that the government did not act in bad faith. See Miller, 2001 WL 300536, at *2.[4] In any event, the government agreed to inform the Court of Miller's assistance, it informed the Court of Miller's assistance,[5] and the Court was fully aware of its ability to downwardly depart, but declined to do so.[6] See United States v. Braimah, 3 F.3d 609, 611 (2d Cir. 1993); Dec. 20, 1999 Tr. at 25.

Miller's argument that the plea agreement is illusory because the government retained discretion to move for a downward departure is frivolous. By entering into the plea

[2] Although the agreement does speak about a motion for substantial assistance, it imposes no obligation whatsoever upon the government to make such a motion and, thus, is as if the plea agreement never even mentioned the making of such a motion.

[3] Of course, the bad faith standard only applies when the government has explicitly agreed to make a substantial assistance motion, but then refuses to do so based upon its determination that the defendant has not, in fact, provided substantial assistance. Here, the government was under no obligation to file such a motion in the first instance.

[4] This same evidence is more than sufficient to find by a preponderance of the evidence that Miller breached the plea agreement.

[5] Miller claims that the government breached the agreement by failing to fully disclose the nature and extent of his cooperation. This argument is rejected for reasons to be discussed.

[6] Because the Court was aware of its ability to downwardly depart for substantial assistance, but declined to do so, Miller's claim that his counsel was ineffective for failure to make a substantial assistance motion must be rejected.

agreement, Miller did obtain a benefit, including having the other charges against him dropped.

b. Whether the Government Breached the Plea Agreement

Miller next contends that the government breached the plea agreement by failing to disclose the nature and extent of his substantial assistance. The plea agreement obligated the government to inform the Court of any assistance provided by Miller. The record reveals that the government did disclose the nature and extent of Miller's assistance. In his papers, Miller does not identify any assistance that he provided that was not disclosed by the government. Accordingly, this claim must be rejected.

c. Actual Innocence/Unknowing and Involuntary Guilty Plea

Next, Miller claims that he is actually innocent and that he unknowingly and involuntarily entered into the guilty plea. This claim is premised upon a Seventh Circuit decision holding that "proceeds" for purposes of the money laundering statute are net profits (as opposed to gross revenues or gross profits) of the criminal business. Scialabba, 282 F.3d 475; see also United States v. Genova, 333 F.3d 750, 760 (7th Cir. 2003). Miller claims that his conduct did not involve the use of net profits, but the reuse of the same capital to pay the expenses of the underlying criminal activity.

The Court rejects this argument because counsel's performance was not objectively deficient. In the somewhat similar context of the RICO laws, the Second Circuit rejected a claim that "proceeds" should be based on net profits. See United States v. Lizza Indus., Inc., 775 F.2d 492, 498 (2d Cir. 1985) (proceeds are gross profits). The majority of Circuit Courts to have addressed the issue have held that "proceeds" include either gross profits or gross receipts; not net profits. See United States v. Simmons, 154 F.3d 765, 770-71 (8th Cir. 1998) (proceeds are gross receipts); United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997) (rejecting Scialabba and noting that proceeds need not be net of taxes); United States v. McHan, 101 F.3d 1027, 1042 (4th Cir. 1996) (proceeds are gross revenues); United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995); see also United States v. Iacaboni, 221 F. Supp.2d 104, 112 n.2 (D. Mass. 2002) (rejecting Scialabba); see also United States v. Szur, 289 F.3d 200, 213-14 (2d Cir. 2002). In fact, it is arguable that, since Lizza Industries, the definition of proceeds has been expanded. When Lizza Industries was decided, the Second Circuit did not have occasion to consider the then-recent amendment to the RICO statutes that specifically opted to use the word "proceeds" rather than "profits." See Lizza Industries, 775 F.2d at 497 n.3. Since Lizza, the Second Circuit has said the word "proceeds" should be afforded its ordinary and customary meaning[7] and that "the funds . . . were the 'proceeds of some unlawful activity' the moment the defendant realized them." United States v. Monaco,194 F.3d 381, 385 (2d Cir. 1999) (citing United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996)); Szur, 289 F.3d at 213-14; Haun, 90 F.3d at 1101. There is no basis for concluding that Congress intended a less expansive definition in the money laundering statute (which is a racketeering activity) than it did in the RICO forfeiture statute. In light of the foregoing, it cannot be said that counsel's performance was objectively deficient.

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[7] The word "proceeds" is defined as "that which results or accrues"; "the total sum derived from a sale or other transaction." Random House Dict. of the English Language at 1146-57 (1979). This is a broad enough definition to include gross revenues.

Moreover, in the plea agreement, Miller admitted that he "agreed with his co-conspirators that Canadian currency from the black market sale of the cigarettes and liquor would be exchanged for U.S. currency or bank credit in order to purchase bank drafts, cashier's checks, and to make interstate wire transfers in order to purchase additional cigarettes and liquor in order to promote the underlying wire fraud scheme." Pl. Agr. at 5. Currency from the sale of the cigarettes and liquor neatly fits within the common definition of "proceeds." Thus, contrary to Miller's current argument that he only reinvested the initial capital, he admitted using "proceeds" from the sale of the cigarettes and liquor.

d. Whether Miller Received Ineffective Assistance of Counsel Because His Attorney Recommended that He Enter into a Plea Stipulating that $79 million Was the Amount of Money that Should be Forfeited to the Government and that $79 Million Was the Value of the Laundered Funds

Miller next contends that his trial counsel erroneously advised him to enter into a plea agreement stipulating that $79 million was the amount of money that should be forfeited to the government and that $79 million was the value of the laundered funds. Miller contends that most of the money involved the reinvestment of the original capital. To the extent Miller is relying upon Scialabba, his argument is rejected for the reasons previously stated. To the extent Miller does not rely on Scialabba, his claim must fail because, as the Second Circuit recently held, "§ 2255 may not be used to bring collateral challenges addressed solely to noncustodial punishments like the one at issue here." Kaminski v. United States, --- F.3d —, — (2d Cir. 2003). Thus, although Miller couches his claim in terms of the ineffective assistance of counsel, because he is challenging his non-custodial forfeiture order, this Court is without subject matter to entertain a collateral attack on that order pursuant to § 2255. Id. at n.1.

To the extent the value of the funds affected Miller's sentence and, thus, is properly before the Court on a § 2255 motion, it was not objectively unreasonable for counsel to believe that the amount subject to forfeiture was not limited to proceeds of the criminal activity, but extended to all property involved in the criminal activity. See United States v. Thompson, 837 F. Supp. 585, 586 (S.D.N.Y. 1993); see also United States v. McGauley, 279 F.3d 62, 75-76 (1st Cir. 2002); United States v. Baker, 227 F.3d 955, 970 n. 4 (7th Cir. 2000) (noting that "even legitimate funds that are commingled with illegitimate funds can be forfeited if the legitimate funds were somehow involved in the offense, such as by helping to conceal the illegal funds"), cert. denied, 531 U.S. 1151 (2001); United States v. Bornfield, 145 F.3d 1123, 1135 (10th Cir. 1998) ("Property 'involved in' an offense 'include[s] the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.'") (quoting United States v. Tencer, 107 F.3d 1120, 1134 (5th Cir. 1997)); McHan, 101 F.3d at 1042 (proceeds are gross revenues); United States v. Voigt, 89 F.3d 1050, 1086 (3d Cir. 1996) ("[T]he government must prove by a preponderance of the evidence that the property it seeks under § 982(a)(1) in satisfaction of the amount of criminal forfeiture to which it is entitled has some nexus to the property 'involved in' the money laundering offense."); see also discussion *supra* at III(C).

Section 982(a)(1) provides that "[t]he court . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." The use of the term "involved in" is extremely broad and can reasonably be interpreted to include more than the proceeds (whether defined as net profits or gross profits) of the criminal activity. See id. Notably, the statutory language of § 982(a)(1) is significantly broader than the language in § 1963 upon which Miller relies. Section 1963 speaks to the forfeiture of "property constituting, or derived from, any proceeds which the person obtained . . . from racketeering activity." The money laundering forfeiture statute, on the other hand, contains no such limitation that the property be derived from "proceeds." It applies to all property somehow involved in the offense.

The sentencing guidelines calculate the base offense level taking into consideration the "value of the laundered funds." U.S.S.G. § 2S1.1(a)(2). The phrase "laundered funds" is defined to mean "the property, funds, or monetary instruments involved in the transaction. . . ." (emphasis added). As with section 982(a)(1), the sentencing guidelines also use the broad phrase "involved in." See United States v. Martin, 320 F.3d 1223, 1225-26 (11th Cir. 2003). Thus, it was not objectively unreasonable for counsel to believe that the value of the funds included the $79 million.

IV. CERTIFICATE OF APPEALABILITY

Inasmuch as Miller presents no viable issues upon which reasonable jurists could debate whether: (a) the sentence was imposed in violation of the Constitution or laws of the United States, or (b) the Court was without jurisdiction to impose such sentence, or (c) the sentence was in excess of the maximum authorized by law, or (d) the sentence is otherwise subject to collateral attack, and Miller has not otherwise "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2); Hohn v. United States, 524 U.S. 236, 240 (1998), a Certificate of Appealability must be DENIED.

V. CONCLUSION

For the foregoing reasons, Miller's motion pursuant to § 2255 is DENIED. In light of this disposition, there is no need for discovery and, thus, Miller's motion for discovery also is DENIED. A Certificate of Appealability is DENIED.

IT IS SO ORDERED

Thomas J. McAvoy
Hon. Thomas J. McAvoy
United States District Judge

Dated: August 15, 2003

MANDATE

N.D.N.Y. Syracuse
02-cv-1234
McAvoy, J.

U.S. DISTRICT COURT–N.D. OF N.Y.
FILED
AT ____ O'CLOCK ____
Lawrence K. Baerman, Clerk – Syracuse

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 5th day of May two thousand four,

UNITED STATES COURT OF APPEALS
FILED
MAY 5 2004
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

Present:

Hon. Dennis Jacobs,
Hon. Chester J. Straub,
Hon. Richard C. Wesley,
Circuit Judges.

United States of America,
Respondent-Appellee,

v. 03-2759-pr

Larry Miller,
Petitioner-Appellant.

Petitioner, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed because the appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: Lucille Carr

SAO-GS

A TRUE COPY
ROSEANN B. MacKECHNIE, CLERK

Certified: MAY 7 2004